Supreme Court, U.S.
FILED
APR 21 2003
CLERK

No. 02-1286

In the Supreme Court of the United States

HOHENBERG BROS. CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DAVID M. COHEN
JEANNE E. DAVIDSON
TODD M. HUGHES
PAUL G. FREEBORNE
JONATHAN S. LAWLOR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly enforced the stipulated judgment entered into by petitioners.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

International Business Machines Corp. v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000), cert. denied, 531 U.S. 1183 (2001)	3
United States Shoe Corp. v. *United States*, 296 F.3d 1378 (Fed. Cir. 2002), petition for cert. pending, No. 02-1221 (filed Feb. 19, 2003)	4, 6
United States v. *United States Shoe Corp.*, 523 U.S. 360 (1998)	2, 3

Constitution and statutes:

U.S. Const. Art. I, § 9, Cl. 5 (Export Clause)	2
Internal Revenue Code (26 U.S.C.):	
§ 4461(a)	2
§ 4461(b)	2
§ 9505(a)	2
§ 9505(c)	2
28 U.S.C. 2411	3

Miscellaneous:

S. Rep. No. 126, 99th Cong., 1st Sess. (1985)	2

In the Supreme Court of the United States

No. 02-1286

HOHENBERG BROS. CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 301 F.3d 1299. The opinion of the Court of International Trade (Pet. App. 16a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2002. The petition for rehearing was denied on November 4, 2002 (Pet. App. 38a-40a). On January 22, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 4, 2003. The petition was filed on

February 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Petitioners are exporters who paid the Harbor Maintenance Tax that applies to "any port use" by commercial importers, exporters, domestic shippers, and passenger lines. 26 U.S.C. 4461(a). The purpose of this harbor use fee is to require the entities that benefit from the use of port facilities to share the burden of the costs borne by the United States in maintaining those facilities. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985). The funds collected by the United States through this port use fee are paid into the Harbor Maintenance Trust Fund and thereafter expended on the operation and maintenance of channels and harbors throughout the United States. 26 U.S.C. 9505(a),(c). Petitioners brought this suit to obtain a refund of their harbor maintenance tax payments.

In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that, in the form presently imposed, these harbor fees could not be applied to exporters under the Export Clause of the Constitution. The Court emphasized that exporters are not "exempt from any and all user fees designed to defray the cost of harbor development and maintenance." *Id.* at 370. The Court held, however, "that such a fee must fairly match the exporters' use of port services and facilities" (*ibid.*) and concluded that the Harbor Maintenance Tax does not qualify as "a bona fide user fee in the Export Clause context" because the value of the exported cargo on which the Harbor Maintenance Tax is calculated (26 U.S.C. 4461(b)) "does not correlate reliably with the federal harbor services used or usable by the exporter." *Id.* at 369. The Court indicated, by

contrast, that a harbor maintenance charge applying to exports could be sustained if it were instead based "on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires." *Ibid.*

Following this Court's decision in *United States Shoe Corp.*, petitioners and the government signed a stipulated final judgment in this case that entitled petitioners to an immediate refund of their Harbor Maintenance Tax payments. Neither party appealed that stipulated final judgment. The amounts determined under that judgment were promptly paid to petitioners by the United States. Pet. App. 4a.

2. The stipulated final judgment in this case specified that an amended judgment would be entered to allow interest on the principal amounts of the judgment if the appellate proceedings in the then-pending test case of *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000) (*IBM*), held that interest was to be paid. Pet. App. 4a. In the *IBM* case, however, the court of appeals eventually determined that interest was not authorized on these refunds. 201 F.3d at 1374. On February 20, 2001, this Court denied the petition for a writ of certiorari in the *IBM* case. 531 U.S. 1183.[1]

---

[1] Following the denial of IBM's petition for a writ of certiorari, IBM attempted to assert various non-statutory, interest theories before the trial court, to which the case had been remanded for vacatur of the original award of interest pursuant to 28 U.S.C. 2411. The Court of International Trade determined that the appellate court's mandate precluded consideration of IBM's non-statutory theories, and further noted that it would deny any claims to interest based upon such theories were it to consider them. The United States Court of Appeals for the Federal Circuit affirmed

3. Not satisfied with this result, petitioners filed a motion before the Court of International Trade in which they sought to amend the stipulated final judgment to permit them to seek an award of interest on grounds that had not been raised in the *IBM* case. The Court of International Trade denied that motion (Pet. App. 16a-25a), and the court of appeals affirmed (*id.* at 1a-11a).

The court of appeals noted that the stipulated judgment signed by petitioners "expressly waived all future claims arising out of its [Harbor Maintenance Tax] export payments against the government." Pet. App. 10a. The consent judgment entered into by the parties "states that the Court of International Trade had jurisdiction under [28 U.S.C.] 1581(i)" and further "expressly states that interest on the refunded amounts depends on the outcome of *IBM*, the § 1581(i) interest test case." Pet. App. 8a (Judgment ¶¶ 2, 6). In the consent judgment, the petitioners also "waived all future claims." *Ibid.* (Judgment ¶ 9). "In short, [petitioners] chose to receive immediate compensation and took a gamble on the outcome of *IBM*." *Id.* at 10a. The court concluded that the "parties to the consent judgment are bound by the terms of the judgment" and held that "the Court of International Trade did not abuse its discretion by holding [petitioners] to [their] bargain and refusing to amend the judgment." *Ibid.* The court further noted that, in *United States Shoe Corp.* v. *United States*, 296 F.3d 1378 (Fed. Cir. 2002), petition for cert. pending, No. 02-1221 (filed Feb. 19, 2003), the court had in any event determined that petitioners' newly advanced theories for an award of interest lack merit. Pet. App. 11a.

---

that decision on March 19, 2003. The time for IBM to seek a writ of certiorari has not yet expired.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that, by entering into the consent judgment, petitioners made an informed decision to forego any interest award other than the award, if any, resulting from the *IBM* test case. The consent judgment "expressly states that interest on the refunded amounts depends on the outcome of *IBM*, the § 1581(i) interest test case." Pet. App. 8a (Judgment ¶ 6). The consent judgment also expressly "waived all future claims" for interest that petitioners might have. *Ibid.* (Judgment ¶ 9). "In short, [petitioners] chose to receive immediate compensation and took a gamble on the outcome of *IBM*." *Id.* at 10a. Having taken that "gamble" and lost, the court of appeals properly found that the petitioners could not now seek to assert any further claim. *Ibid.* As the court emphasized, "parties to the consent judgment are bound by the terms of the judgment" and it was not an abuse of discretion for the trial court to hold petitioners to their "bargain and refus[e] to amend the judgment." *Ibid.*

In reaching these conclusions, the court of appeals properly applied "general principles of contract law" in interpreting the stipulated judgment. Pet. App. 6a. Application of those general principles to the particular facts of this case creates no conflict among the circuits and does not warrant review by this Court.

Similarly, the court's determination that the Court of International Trade did not abuse its discretion in declining to amend the judgment provides no basis for

further review. The court of appeals properly noted that a refusal to amend the stipulated judgment was reviewed under an abuse of discretion standard, and that the proponent therefore must show that the trial court's decision was "clearly unreasonable, arbitrary or fanciful, or based on clearly erroneous findings of fact or erroneous conclusions of law." Pet. App. 6a. Petitioners do not even contend that the Court of International Trade made any such error in denying the motion to amend.

2. Because petitioners waived any claim for future or additional relief, they have not preserved the new theories for the recovery of interest that were first raised—and rejected by the Federal Circuit—in *United States Shoe Corp.* v. *United States*, 296 F.3d 1378 (2002), petition for cert. pending, No. 02-1221 (*United States Shoe Corp. II*). Since petitioners in *this* case agreed to be bound by the outcome of the *IBM* case, and to waive any other claims (Pet. App. 6a), the resolution of the claims asserted in *United States Shoe Corp. II* have no relevance to this case. And, since the exporter in *United States Shoe Corp. II* did not enter into the consent judgment that petitioners signed in this case, the claims presented in *United States Shoe Corp. II* are not affected by the denial of petitioners' motion to amend their consent judgment in this case.

The petition in this case should therefore be denied regardless of the resolution of the petition in *United States Shoe Corp. II*. Moreover, for the reasons stated in detail in our brief in opposition to the petition for a writ of certiorari in *United States Shoe Corp. II*, the additional interest theories advanced by the petitioner in *that* case were also properly rejected by the court of

appeals and do not warrant further review by this Court.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DAVID M. COHEN
JEANNE E. DAVIDSON
TODD M. HUGHES
PAUL G. FREEBORNE
JONATHAN S. LAWLOR
Attorneys

APRIL 2003

---

[2] We are providing herewith to petitioners a copy of the brief in opposition filed by the United States in *United States Shoe Corp. II*, No. 02-1221.